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IN THE

Supreme Court of the United States

TERM 1963.

No. 591

ALEXANDER McDONALD,
Petitioner,

vs.

UNITED STATES OF AMERICA, and
BETHLEHEM STEEL COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a Writ of Certiorari issue to review a judgment entered in the above entitled cause on August 1, 1963 (P26a), by the United States Court of Appeals for the Third Circuit, in which that Court ordered and adjudged that the judgment of the United States District Court for the District of New Jersey, filed March 15, 1962 (272a), in the said cause, be affirmed.

NOTE. References herein to certified Transcript of Record are: Appellant's appendix in Court of Appeals is cited as "....a"; proceedings in Court of Appeals is cited as "P....a", and are in appendix hereto.

Opinions Below.

At the conclusion of the trial of an admiralty libel action in the United States District Court for the District of New Jersey, the Trial Court entered oral conclusions and determinations on the record (264a). The findings of fact and conclusions of law were subsequently filed (267a) and a decree was entered March 15, 1962 (272a) ordering and adjudging that the libel and impleading petition be dismissed without costs in favor of the United States of America, the respondent, and against Alexander McDonald, petitioner. The opinion of the United States Court of Appeals for the Third Circuit filed August 1, 1963 (P26a) is reported 321 Fed. 2d 437.

Jurisdiction.

The date of entry of the judgment of the Court of Appeals sought to be reviewed is August 1, 1963 (P26a). The jurisdiction of this Court is envoked under 28 U. S. C., § 1254(1).

Questions Presented.

1. Does the doctrine of seaworthiness apply to a ship sold under a covenant of seaworthiness which though without Coast Guard certificate or steam and electricity was in navigable waters in a shipyard undergoing a process consisting of repairs and deactivation as preliminary to being retired in the moth-ball fleet?

2. Where the owner or husbanding agent of a ship being repaired and deactivated places it in a shipyard but (a) operates pursuant to N. S. A. Order No. 64 (Opr—4 revised) and (b) the general agent thereof is required to properly supervise the work outlined therein, prepare specs, account for specific work performance and (c) the general agent maintains mates aboard, employs independent guards and independent contractors for part of the work, are the owner and agent subject to liability for fault with respect to the maintenance and condition of parts of the ship or resulting from conduct of the shipyard? (Ancillary questions, if petition granted.)

3. Considering applicable scope of Appellate review should the fact-findings and legal conclusions be reversed to the end that, exercising original jurisdiction, judgment as to liability should be entered in favor of petitioner?

4. Did the Trial Court err in excluding the deposition of a mate in the employ of American Export offered as an admission?

Statutes Involved.

46 U. S. C. A. § 781:

"A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided*, That the cause of action arose after the 6th day of April, 1920. (Mar. 3, 1925, ch. 428, § 1, 43 Stat. 1112.)"

28 U. S. C. A. § 1333(1):

"The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize. (June 25, 1948, Ch. 646, 62 Stat. 931; May 24, 1949, ch. 139, § 79, 63 Stat. 101.)"

N. S. A. Order 64 (OPR-4 Rev.), 23 Fed. Register 2914 [Exhibit L-5, 256a].

Statement.

On March 17, 1959, the S.S. Exechorda was sold by American Export Lines (Export, herein) to the United States of America by a bill of sale which contained an expressed warranty that, among other things, the vessel is tight, staunch, well and sufficiently tackled, appareled, furnished and equipped and in every respect seaworthy (233a) and in good running condition and repair in accordance with the provisions of the contract for the trade-in of obsolete vessels referred to therein. The ship was to be deactivated and moth-balled for the reserve fleet. (See Contract, Exhibit L-2, 221a.) Export was general agent in accordance with N. S. A. Order No. 64 (May 1, 1958), 23 Federal Register 2914 (Exhibit L-5, 256a). That order, in outlining the general agent's responsibilities required the general agent to properly supervise the work outlined therein (Exhibit L-5, Sec. 2(c)) to prepare the specifications covering the de-activation work (Exhibit L-5, Sec. 2(b)) and to have certain work items performed prior to the delivery of the ship to the reserve fleet, including: seeing that all 'tween deck hatch beams be properly in place and all wooden 'tween deck hatch covers be spread over hatches leaving a three inch air space between hatch covers and all 'tween deck hatches had to be properly and entirely roped off (Exhibit L-5, Sec. 3(a)(2)).

On April 1, 1959, the libelant, an employee of Bethlehem Steel Shipyards (Bethlehem, herein) was quite seriously injured while working aboard the ship in the Bethlehem yard. He fell through an open part of a hatch cover and through the square of the hatch (84a, 113a, 114a). Two of

the boards in the hatch cover had been removed and the area was insufficiently lit or roped off to give notice of that condition (119a, 120a). One of the boards was completely off, the other half-way off. The ship had been towed into the yard on March 16. Between that date and April 1st no engine room work had been done, nor was any drainage done to the vessel (158a); the major repair work was completed (158a); about ten days work had been done on de-activation (159a); the ship was being transferred on that date to another Bethlehem yard where further de-activation was to be done before the retirement of the vessel (140a). The accident occurred shortly before the hour fixed for the transfer. An examination of the ship's log reveals the extent of work done as of April 1 and the amount of work done after April 1. The log is Exhibit L-6 (258a). It was not until May 1, a month after the incident in issue that the vessel was accepted in the reserve fleet (see entry for that date in the log). The Trial Court found the condition of the ship as of April 1 to be as follows:

> "In addition to ordinary repairs, de-activation work had been carried on, including the following: the vessel's stern tube was disconnected and filled with preservative; her tail shaft was secured to prevent the turning of the propeller; her sea chests and all underwater overboard discharge lines were permanently blocked off; one shot of chain was disconnected from both the port and starboard anchor chains; the shaft alley drain well was cleaned out; the ship's gangways were stowed in a lower hold; life boards were removed and stowed in a lower hold; the radar scanner was dismantled, and all storage lockers were permanently sealed off." (Finding No. 8, 268a.)

While the ship was in Bethlehem's yard the repair and deactivation work was being done pursuant to a series of daily written work or sale orders entered into between Bethlehem and Export (Exhibit L-8, 260a). A Mr. Johansen, who was Export's representative (154a) worked about the ship with Mr. Cavenaugh, Bethlehem's man. Johansen went over the specs almost every day (199a); when work wasn't satisfactory he told Mr. Cavenaugh to complete the work to his (Johansen's) satisfaction (199a). Export had some of its own independent contractors aboard ship from time to time (200a, 201a, 203a) and maintained both guards (148a) and mates (149a) aboard the ship. The nature of the work orders was such as to require constant direction and participation in decision making and testing by Export, although the physical work was performed, in the main, by Bethlehem. The contract under which United States sold the vessel to Export required Export to perform all the work required in connection with the preparation for the lay-up of the vessel as prescribed in N. S. A. Order No. 64 (Exhibit L-2, Article 6(b), 226a) and provided that the vessel on delivery to the United States shall be (so far as due diligence can make her so) tight, staunch, strong and well and sufficiently tackled, appareled, furnished and equipped, and in every respect seaworthy and in good running condition and repair (Exhibit L-2, Article 7, 227a). To this end Export undertook to perform its contractual obligation by entering into a series of sale orders or work orders, the first dated March 11 and the subsequent ones being referred to as "supplements" thereto (Exhibit L-8, 260a) calling for a close working arrangement between Export and the shipyard. The requisition (Exhibit L-4, 234a) expressly

included many items subject to direction by Export. See in particular the following items referring to work to be done "as directed" or "where required" or "to satisfaction of owner's representative" or "as directed by chief engineer": item 4 (235a); item 6 (236a); item 10 (238a); item 14 (239a); item 16 (239a); item 17 (239a); item 20 (241a); item 24 (243a); item 29 (244a); item 30 (244a).

While the ship was in Bethlehem's yard certain painting was supervised by Export while the ship was in drydock (143a). That painting was done by an independent contractor engaged by Export. During the course of the normal work day Export would give additional items of work to Mr. Cavenaugh (146a). Cavenaugh worked in conjunction with Mr. Johansen (150a) went with him to the areas being worked on and gave him directions as to the work being done (150a). Bethlehem and the owner's representation functioned in conjunction with each other (179a).

Reasons for Granting the Writ.

(It was stipulated below that the United States of America is subject to liability vicariously for that of Export, Export having husbandry agents' statutory immunity from liability.)

1. The Supreme Court has not passed upon the effect of a warranty of seaworthiness in a bill of sale in an action instituted by a dockside employee performing painting services on a vessel undergoing repair and deactivation for retirement to the mothball fleet.

2. The Supreme Court has not passed upon the issue of whether a ship in the process of deactivation for retirement to the mothball fleet should be considered a "dead ship" with respect to the admiralty concept of seaworthiness.

3. The Supreme Court has not passed upon the issue of whether the kind of control and supervision required by N. S. A. Order No. 64 of a husbandry agent is such as to permit relieving the husbandry agent, which operates for the United States, of liability while its vessel is in a private shipyard undergoing repairs and deactivation for retirement to the mothball fleet; nor whether a vessel can be said to be in the control of a shipyard while work is being performed in accordance with a series of separately executed sale or work orders which day by day detail the kind of work to be done and require of the husbandry agent continuous direction, instruction and supervision and testing with respect to the details of performance of the repair and deactivation work being performed by the shipyard.

ARGUMENT.

POINT I.

The warranty of seaworthiness should extend where a vessel is being prepared for retirement to the mothball fleet.

Where, as at bar, a vessel is being retired to the mothball fleet the warranty of seaworthiness should apply until the retirement is complete. The contract to sell and the bill of sale speak in terms of a warranty of seaworthiness. It was a bargained for consideration; hence it cannot be said that it would be unfair to say that the owner held the vessel out as seaworthy. The seaworthy warranty referred to contractually is in essence the same kind of warranty implied in admiralty law. *West* v. *United States*, 361 U. S. 118, 4 L. Ed. 2d 161, 80 S. Ct. 189; *Roper* v. *United States*, 368 U. S. 20, 7 L. Ed. 2d 1, 82 S. Ct. 5, and *Latus* v. *United States*, 277 F. 2d 264 (2d Cir. 1960), cert. den. 364 U. S. 827 (1960), involved instances where ships had been mothballed and completely taken out of navigation. In *West* and *Latus* they were being reactivated. In *Roper* the vessel was being used for storage of grain. In the case at bar the incident occurred before the vessel had reached that point at which it would be mothballed. It was still intended and contemplated that it ride upon the waters both to Bethlehem's other yard and then to its final place of storage. *Latus* provides that the concept of seaworthiness should not be fragmentized. That dead ship was regarded as dead while being revived. Similarly it should be considered that even a dying ship is not yet dead. The policy factor justify-

ing this conclusion is the realistic recognition that Export received slightly over a million and a half dollars (223a, 224a) by way of the trade-in "allowance". The deep pocket should bear the burden of losses which arise incident to the venture in which the money is realized.

Where a ship is being deactivated the warranty of seaworthiness certainly existed at the inception of the deactivation process. Those entitled to the benefit of the warranty should not lose it on a day-to-day basis as if it were being whittled away fragment by fragment as the ship underwent deactivation. Neither logic, precedent nor any sound social policy would warrant such a conclusion. Nor should deactivation be equated with instances in which vessels are taken out of navigation where control is turned over to a shipyard for a purpose of major repairs because in the mothball cases the ship owner remains contractually liable for the performance of the deactivation and is required by N. S. A. Order No. 64, to be responsible for the performance of the deactivation work. This creates a non-delegable situation quite different from general contract instances. In the mothball operation although to a substantial extent the physical work may be done by a shipyard the principal financial remunerations flow to the benefit of the husbanding agent, and not the shipyard. In *Noel* v. *Isbrandtsen Co.* (1961, C. A. 4, Va.), 287 F. 2d 783, cert. den. 366 U. S. 975, 6 L. ed. 2d 1264, 81 S. Ct. (1944), the court citing *West* concluded that the question was "the status of the vessel at the time of the accident" and found the vessel to be a dead ship because it was no longer in service. That is the only case research has located to date involving a vessel in preparation for mothballing. It is submitted that *West* did not necessitate the conclusion

therein reached. Factually the case at bar is distinguishable from *West* in the incidents of control, supervision and duty of the husbanding agent. The *Mary Austin* was never represented contractually or otherwise to be seaworthy.

In *United New York and New Jersey Sandyhook Pilots Association* v. *Halecki*, 358 U. S. 613, 79 S. Ct. 523, 3 L. Ed. 2d 541 (1959), Mr. Justice Stewart speaking for five members of the Court stated that where the decedent was not a member of the class in whose favor the doctrine of unseaworthiness runs because he was doing specialized work not customarily performed by seamen, nevertheless he was owed a duty of exercising reasonable care for his safety by the owners of the pilot boat on which he was working when through their negligence he became asphyxiated. Mr. Justice Brennan with whom the Chief Justice, Mr. Justice Black and Mr. Justice Douglas joined, dissented and expressed the conclusion that the doctrine of seaworthiness extended even to him. And this notwithstanding the assertion in the majority opinion that the ship was a "dead ship."

There is a paucity of authority with respect to the status of a ship as a "dead ship" and the legal consequence emanating therefrom. Perhaps the classic decision is *Hercules Co.* v. *The Brigadier General Absolom Beard*, 214 Fed. 2d 66 (C. A. 3d Cir. 1954), where our own Circuit, in considering the characteristics of a "dead ship" said:

> "When service is performed she was tight and navigable, at least to the extent she could be towed."

POINT II.

The requirements of N. S. A. Order No. 64 and the method of operation undertaken pursuant thereto preclude the husbanding agent from insulating itself from liability arising by reason of the maintenance of a negligent condition aboard the ship.

The order appears as Exhibit L-5 (256a). It outlines the general agent's responsibilities in connection with the work required for the proper stripping and deactivation of ships assigned to the reserve fleet. It generally also defines the nature and extent of the work required to properly prepare a ship for layup. Among other things it provides for the reduction of the ship's personnel to only those necessary "to perform or supervise" the work involved. The general agent prepares specifications covering the deactivation work and must supervise the work outlined in the order. The details enumerated in the order as to the work to be done necessarily require that proper supervision thereof entail at the minimum a close working arrangement between the general agent and any contractors or shipyard doing work toward deactivation.

In *Finley* v. *United States* (unreported opinion of Judge Meaney—filed June 9, 1959, Civil Action No. 326-51), the Court re-examined the seaworthiness and negligence problems as presented in admiralty litigation by shoreside workers. No warranty of seaworthiness was found to exist since the vessel was completely out of service when the worker was injured and was in the course of rehabilitation. With respect to negligence, the Court stated that the determination of whether the United States exercised

reasonable care with respect to the ship as a whole, and more particularly to the area in which the libelant was injured required examination of the relationship between the owner and the contractor who was working under an express written contract. Although the owner had no crew aboard and had given actual possession to Todd, nevertheless it did not simply limit its participation to seeing if the job complied with the contract. Hence, since in short, there was a close working arrangement between the United States and Todd, the duty of the United States to exercise reasonable care with respect to the ship's premises was neither terminated nor suspended. Since its duty under such circumstance was non-delegable the fact that the failure was on the part of Todd, the contractor, did not excuse the United States as owner from liability to the libelant. In fact the Court there said that the conclusion was:

> "inescapable that the United States did not take sufficient or adequate steps * * *"

to avoid the cause of the libelant's injury.

In the case at bar although the trial court's finding was that there was no evidence that any work was done on orders of the Maritime Administration's representative or the representative of its agent, American Export Lines (Finding No. 27, 270a) the testimony of Mr. Cavenaugh, Bethlehem's supervisor on the job (137a) was as follows:

> "Q. Now, if you worked daily aboard this vessel did you work in conjunction with Mr. Johanson? A. Yes.
>
> Q. Did he go with you to the areas being worked on? A. Yes, sir.

Q. Did he give you any direction as to the work being performed aboard the S.S. Exechorda? A. Why, yes.

Q. And what type of orders did he give you? A. Well, they would be orders regarding the work, if he didn't feel it was being performed the way he felt it should be he would tell me and we would do it the way he wanted it.

Q. Did you at any time, you or employees of Bethlehem, at your direction redo any work which did not come up to the satisfaction of Mr. Johanson? A. I imagine there were several occasions like that.

(178) Mr. Lynch: I move that be stricken on the ground of imagination.

The Court: You mean there were or you just imagine there were?

The Witness: There were some, but I couldn't actually spell them out." (150a).

The Supreme Court has not passed upon the effect of N. S. A. Order No. 64 on tort cases arising in admiralty.

At bar it should make no difference whether the dangerous condition aboard ship resulted from acts of Bethlehem or not; factually there was conflict as to whether Export's man or Bethlehem's man had ordered the removal of the boards over the hold. Bethlehem's man swore that the very order to remove the hatch boards in issue came from Mr. Johansen, Export's man (154a). In either event it was the original obligation of the general agent to cause the fittings and covers on the 'tween deck hatches to be secure. It is submitted that the duty is a non-delegable one and that the performance and detailed supervision of performance as a matter of law exposed

the husbanding's agent to liability although the courts below held otherwise.

Conclusion.

For the foregoing reasons it is respectfully submitted that novel and important questions are presented and that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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LEVY, LEMKEN & MARGULIES,

By SEYMOUR MARGULIES,
Of Counsel with the Petitioner.

APPENDIX A.

321 Fed. 2d 437 (1963).

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,086

ALEXANDER McDONALD,

Libelant-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee,

and

BETHLEHEM STEEL COMPANY,

Impleaded Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued February 5, 1963

Before: KALODNER, STALEY and SMITH, *Circuit Judges.*

Opinion of the Court.

(Filed August 1, 1963.)

SMITH, *Circuit Judge.*

This suit in admiralty for personal injuries was brought against the United States of America under the Public Vessels Act, 46 U. S. C. A. §§ 781-790, and against the American Export Lines under 28 U. S. C. A. § 1333(1). The alleged grounds of liability were breach of warranty of seaworthiness, and negligence. The suit against Export Lines was dismissed before answer filed, on consent of the libelant. The remaining respondent impleaded the Bethlehem Steel Company, the libelant's employer. The present appeal is from a final decree dismissing the libel and the impleading petition.

The libelant, an employee of Bethlehem Steel, was injured on April 1, 1959, while employed as a painter on the S.S. Exochorda. This vessel was formerly owned by Export Lines and had been out of service for approximately one year. It was acquired by the United States on March 16, 1959, under a contract, pursuant to the terms of which Export Lines, as General Agent,[1] was required to have the vessel completely overhauled, put in a state of repair, and deactivated, preparatory to its being placed in the reserve fleet, commonly known as the "moth ball" fleet. This extensive work was to be done in accordance with NSA Order No. 64 (OPR-4 Revised)[2] and specifications prepared by Export Lines. The contract for the work was awarded to Bethlehem Steel.

The vessel was towed to the shipyard of Bethlehem Steel without steam or power, and without a crew. It was delivered at the shipyard on March 16, and on the following day was placed in dry dock, where it remained until

[1] 32(a) C. F. R. 317, et seq. (1958 Revision).

[2] Ibid.

March 20, when it was refloated and moored at pier side, where it remained until shortly after noon on April 1, the date of the accident. The work on the vessel was performed during the period from March 17 until April 1, inclusive, during which time the vessel was in the exclusive possession and control of Bethlehem Steel.

While the work was in progress there were several crew members, employed by Export Lines, on board from day to day, but their only responsibility was to inspect the work and to see that it was performed in accordance with the specifications; they exercised no control over the work or the manner of its performance. Export Lines also maintained an hourly security watch to protect the gear and equipment of the vessel against pilferage.

The accident occurred approximately four to five hours before the S.S. Exochorda was to be redelivered to Export Lines. The necessary repairs were near completion and the vessel had been completely deactivated. The trial judge found: "* * * the vessel's stern tube was disconnected and filled with preservative; her tail shaft was secured to prevent the turning of the propeller; her sea chests and all underwater overboard discharge lines were permanently blocked off; one shot of chain was disconnected from both the port and starboard anchor chains; the shaft alley drain well was cleaned out; the ship's gangways were stowed in a lower hold; life boats were removed and stowed in a lower hold; the radar scanner was dismantled, and all storage lockers were permanently sealed off." These findings are amply supported by the evidence.

It was on the basis of the facts hereinabove outlined that the trial judge concluded that the S.S. Exochorda had been deactivated and withdrawn from navigation and that under the circumstances there was no implied warranty of seaworthiness. It is argued on behalf of the libelant that this conclusion was erroneous. The argument is without merit.

Appendix A—Opinion of the Court.

CLAIM BASED ON WARRANTY OF SEAWORTHINESS.

We recognize at the outset, as we must, that under the implied warranty of seaworthiness the shipowner is under a duty to maintain the vessel, its gear and appurtenances, reasonably safe and suitable for the purposes intended. This duty, which is absolute and nondelegable, is owed not only to the members of the crew but also to the shore based employees of an independent contractor engaged aboard ship in work customarily performed by seamen. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953). However, it has been authoritatively settled, if it was ever in doubt, that the implied warranty may not be invoked as a basis of liability where the vessel has been withdrawn from navigation and is undergoing extensive renovation and repairs. *West* v. *United States*, 361 U. S. 118 (1959); *Latus* v. *United States*, 277 F. 2d 264 (2d Cir. 1960), cert. den. 364 U. S. 827 (1960). It has been held that in these circumstances there is no warranty of seaworthiness. Ibid.

It is argued on behalf of the libelant that the cited cases are distinguishable because of their "converse fact situation[s]." The vessels involved in each of the cited cases had been withdrawn from the "moth ball" fleet and, at the time of the accidents in which the workmen were injured, were undergoing extensive repairs preparatory to their reactivation and return to maritime service. We fail to perceive any validity in this attempted distinction. The rule of the *West* case was applied in *Noel* v. *Isbrandtsen Company*, 287 F. 2d 783 (4th Cir. 1961), cert. den. 366 U. S. 975 (1961), a case in which a workman sustained injury while the vessel was undergoing repairs and deactivation, as in the present case. The libelant's argument, and the reasons advanced in support of it, are clearly without merit.

We should emphasize that the decision of the Supreme Court in the *West* case was predicated not only on the fact that the vessel had been withdrawn from maritime service but also on the further fact that it was "undergoing major repairs and complete renovation" at the time the workman sustained injury. Therein the Court stated, at page 122: "This undertaking was not 'ship's work' but a complete overhaul of such nature, magnitude, and importance as to require the vessel to be turned over to a ship repair contractor and docked at its pier for the sole purpose of making her seaworthy. It would be an unfair contradiction to say that the owner held the vessel out as seaworthy in such a case." The rule of the case must be applied where, as here, the vessel has been withdrawn from maritime service and is undergoing extensive overhaul and repair preparatory to its deactivation. *Noel* v. *Isbrandtsen Company, supra.*

The shipowner's liability under the warranty of seaworthiness is dependent upon not only the specific task being performed by the workman at the time of injury but also the nature and scope of the work in which he and other shore based employees are engaged. *West* v. *United States, supra; United Pilots Assn.* v. *Halecki,* 358 U. S. 613 (1959); *Desper* v. *Starved Rock Ferry Co.,* 342 U. S. 187 (1952); *Berryhill* v. *Pacific Far East Line,* 238 F. 2d 385 (9th Cir. 1956), cert. den. 354 U. S. 938; *Raidy* v. *United States,* 153 F. Supp. 777, affd. 252 F. 2d 117 (4th Cir. 1958), cert. den. 356 U. S. 973 (1958). See also *Latus* v. *United States, supra.* The warranty of seaworthiness does not extend to a shore based employee who, at the time of injury, was engaged with others in the general overhaul and renovation of a vessel temporarily withdrawn from maritime service. Such work is customarily performed in a shipyard equipped for the purpose, and is not work traditionally performed by seamen. Ibid.

CLAIM BASED ON NEGLIGENCE.

The libelant charges that the respondent was negligent in that it failed to exercise reasonable care to furnish him with a safe place to work. The trial judge concluded, on findings of fact supported by substantial evidence, that the respondent owed no duty to the libelant. This conclusion is challenged as erroneous.

The accident occurred on the morning of April 1, shortly after 7:30 A.M., while the S.S. Exochorda was still in the possession and control of Bethlehem Steel. The libelant and another workman, accompanied by their foreman, descended from the main deck to the 'tween deck, where they made an inspection of painting work which had been completed in the laundry on the previous day. Then, intending to return to the main deck by way of a ladder located in a cargo hold, they walked along a lighted passageway into the hold, which was in semidarkness, the portable lights having been removed the previous day.[3] As the libelant proceeded across a hatch cover, he fell through an opening which had been created by the removal of two boards. There was some conflict in the testimony as to who had removed the boards. However, the trial judge found that the boards had been removed during the night prior to the accident by employees of Bethlehem Steel on the orders of a job supervisor.

The shipowner in possession and control owes a duty of reasonable care to workmen who come aboard the vessel to make repairs. The duty is to exercise reasonable care to furnish the workmen with a safe place to work. *Mesle* v.

[3] Work in the hold had been completed on March 31, and after its completion the portable lights were removed and the main hatch was covered by the employees of Bethlehem Steel.

Kea Steamship Corporation, 260 F. 2d 747 (3rd Cir. 1958), cert. den. 359 U. S. 966 (1959); *Brabazon* v. *Belships Co.*, 202 F. 2d 904 (3rd Cir. 1953). However, the test of the shipowner's responsibility is possession and control. Where, as here, possession and control of the vessel are relinquished to an independent contractor, the shipowner owes no duty to the contractor's employees. *West* v. *United States*, and *Latus* v. *United States*, *supra*. It was said by the Supreme Court in the *West* case, at page 123: "It appears manifestly unfair to apply the requirement of a safe place to work to the shipowner when he has no control over the ship or the repairs, and the work of repair in effect creates the danger which makes the place unsafe."

The libelant argues that possession and control of the S.S. Exochorda was retained by the respondent. The trial court found otherwise, and this finding, supported as it was by substantial evidence, cannot be held "clearly erroneous" under the rule of *McAllister* v. *United States*, 348 U. S. 19, 20 (1954). The libelant's argument rests on a rather tenuous factual basis which does not warrant discussion.

EXCLUSION OF DEPOSITION.

At the conclusion of the respondent's case the libelant offered in evidence, by way of rebuttal, portions of a deposition. This deposition was that of a mate employed aboard the S.S. Exochorda while the work of renovation and deactivation was in progress. The offer of proof was rejected, and thereupon the libelant withdrew the deposition and did not make it a part of the record. It has been established that under these circumstances we are not required to consider the assignment of error predicated on the exclusion of the deposition. *Palmer* v. *Hoffman*, 318 U. S. 109, 116 (1943). We have nevertheless considered the question raised on the merits.

The mate was in attendance throughout the trial but was not called as a witness by either party. However, the libelant argues that the deposition was that of a "managing agent," and was therefore admissible under Rule 30A(d)(2) of the Rules of Practice in Admiralty and Maritime Cases, as amended, 28 U. S. C. A.[4] We do not agree. The mate was not per se a "managing agent" within the meaning of the rule. The admission of his deposition would have been error. *Naylor* v. *Isthmian S.S. Co.*, 187 F. 2d 538, 540 (2d Cir. 1951); see also *Santiago* v. *American Export Lines, Inc.*, 30 F. R. D. 372 (S. D. N. Y. 1962). It appears from the undisputed testimony in the record that the position of the mate was that of an inferior officer who had no supervisory authority and acted under the supervision and direction of his superior, a port engineer in the employ of Export Lines. It is clear that under these circumstances it cannot be held that the mate was a "managing agent." Ibid.

The judgment of the District Court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[4] The brief of the appellant incorrectly cites as authority the Federal Rules of Civil Procedure.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,086

ALEXANDER McDONALD,

Appellant,

vs.

UNITED STATES OF AMERICA,

vs.

BETHLEHEM STEEL COMPANY,

(Impleaded Respondent).

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: KALODNER, STALEY and SMITH, *Circuit Judges.*

Judgment.

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed March 15, 1962 in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

August 1, 1963